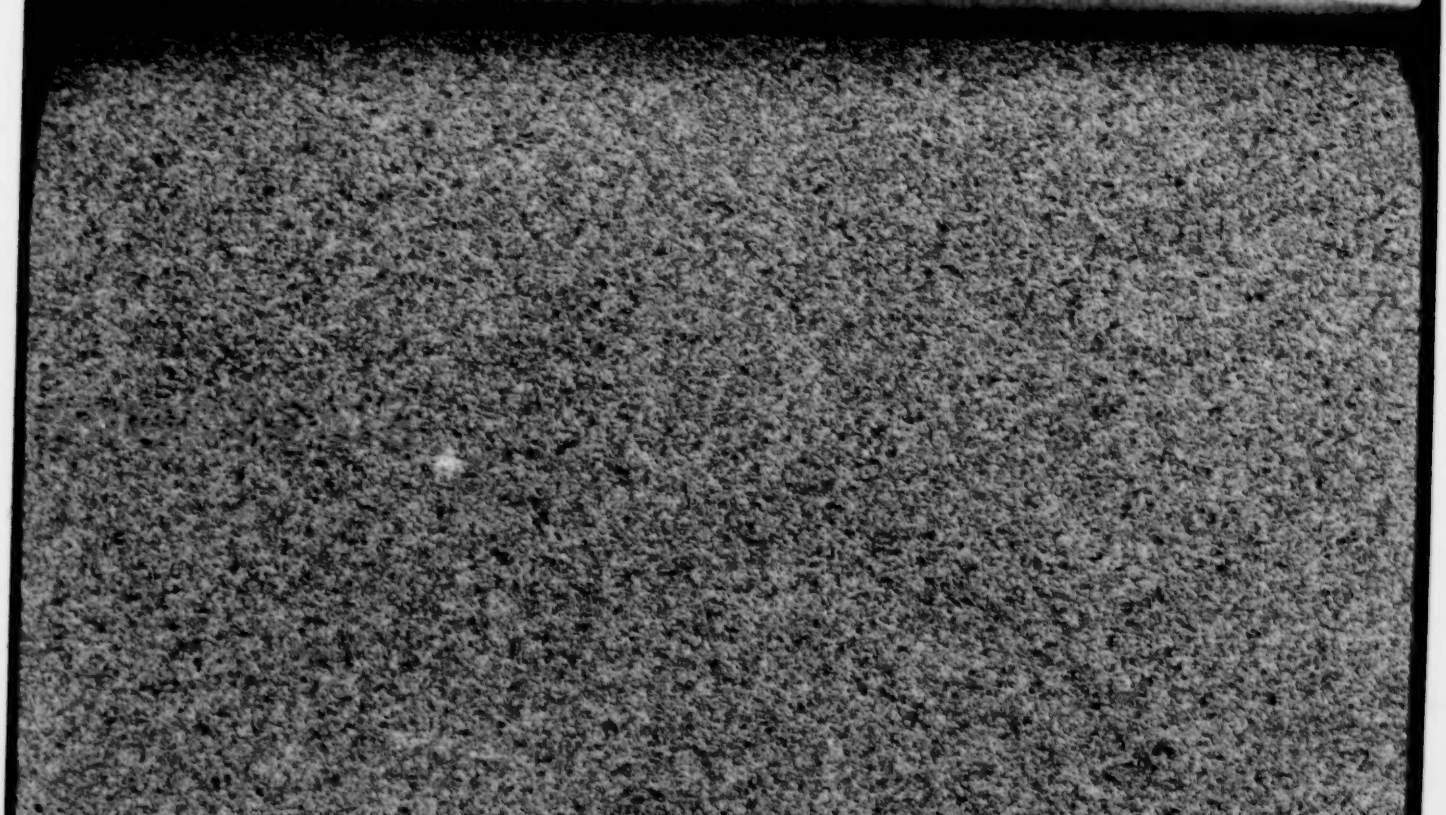

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 324.

THE UNITED STATES OF AMERICA,
Plaintiff In Error,

v.

L. COHEN GROCER COMPANY,
Defendant In Error.

STATEMENT OF THE CASE, BRIEF AND ARGUMENT OF THE DEFENDANT IN ERROR.

CHESTER H. KRUM,
LOUIS B. SHER,
For Defendant in Error.

A. B. STEELE & CO., 10 S. THIRD ST., ST. LOUIS

SUBJECT INDEX.

Statement of the Case.

Points and Brief.

Instant Case.

Argument.

CASES REFERRED TO.

As to Powers of Congress.

As to Violation of Amendment V.

As to Violation of Amendment VI.

Views District Judges, on Point.

IN THE

Supreme Court of the United States.

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THE UNITED STATES OF AMERICA,
Plaintiff In Error,

v.

L. COHEN GROCER COMPANY,
Defendant In Error.

STATEMENT OF THE CASE.

The defendant in error, a corporation, organized under the laws of the State of Missouri, was at the September term of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri indicted upon two counts as follows:

United States of America,
Eastern Division of the Eastern } ss:
Judicial District of Missouri,

In the District Court of the United States, within and for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919.

The grand jurors for the United States of America, duly empaneled, sworn and charged in and for the District Court of the United States, for the Eastern Division of the Eastern Judicial District of Missouri, at the September term thereof, A. D. 1919, and inquiring in and for said division of said district, upon their oaths present and charge:

That on or about the 3d day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office and principal place of business located at or in the immediate vicinity of 1014 North Seventh street, in the City of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, **was a dealer in sugar and other necessaries**, and on or about said 3d day of December, A. D. 1919, at said City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, did **wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar**, in this, to-wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 3d day of December, A. D. 1919, at the City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court

aforesaid, being engaged as a dealer in the necessary as aforesaid, did wilfully and feloniously demand of, and exact and collect from and of one B. Heligman, whose given name is to the grand jurors unknown and can not, therefore, be herein set our, the sum of ten dollars and seven cents ($10.07), as and for the purchase price of about fifty (50) pounds of granulated sugar then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second Count.

And the grand jurors aforesaid, on their oaths aforesaid, do further present and charge:

That on or about the 4th day of December, A. D. 1919, and at all times herein mentioned, while a state of war existed between the United States of America and the German Government, the L. Cohen Grocery Company was a corporation duly organized and existing under the laws of the State of Missouri, with its main office and principal place of business located at or in the immediate vicinity of 1014 North Seventh street, in the City of St. Louis and State of Missouri; that the said L. Cohen Grocery Company then, and at all times herein mentioned, was a dealer in sugar and

other necessaries, and on or about said 4th day of December, A. D. 1919, at said City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, **did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar,** in this, to wit:

That it, the said L. Cohen Grocery Company, not then and there being a farmer, gardener, horticulturist, vineyardist, planter, ranchman, dairyman, stockman, or other agriculturist engaged in dealing in farm products produced or raised upon any land owned, leased, or cultivated by it, on or about the said 4th day of December, A. D. 1919, at the City of St. Louis, in the State of Missouri, and within the division and district aforesaid, and within the jurisdiction of the court aforesaid, being **engaged as a dealer in the necessary as aforesaid**, did **wilfully and feloniously demand of, and exact and collect from and of one B. Heligman**, whose given name is to the grand jurors unknown and cannot, therefore, be herein and set out, **the sum of nineteen dollars and fifty cents** ($19.50), as and **for the purchase price of one bag of granulated sugar**, containing in the aggregate approximately one hundred (100) pounds, **then and there purchased by the said B. Heligman from the said L. Cohen Grocery Company**, which said purchase price so demanded, exacted, and collected for the said granulated sugar by the said L. Cohen Grocery Company from the said B. Heligman was and constituted an unjust and unreasonable rate and charge as it, the said L. Cohen Grocery Company, then and there well knew.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Vance J. Higgs,
Special Assistant to the Attorney General.

To this indictment, the defendant in error demurred as follows:

In the District Court of the United States for the Eastern Division, Eastern District of Missouri.

The United States of America,
Plaintiff.
v.
The L. Cohen Grocer Company,
Defendant.
No. 7283.

Now and hereby entering its appearance to the above entitled indictment, the defendant, the L. Cohen Grocer Company demurs to the indictment and each count thereof and says, that they are insufficient in law and that the defendant should not be required to answer to or defend against them for the following reasons:

1. Neither count states facts sufficient to constitute an offense.

2. Neither count sufficiently, or in any manner advises the defendant of the nature and cause of the accusation against the defendant; neither count states facts which will enable the defendant to properly prepare for trial, or advises the defendant of what it will be required to meet at such trial, and neither

count states such facts as, in the event of a conviction or acquittal, will enable the defendant to plead the result in bar to a subsequent indictment for the same offense.

3. Each count of the indictment is violative of the Constitution of the United States, in this, to-wit:

1. Congress having declared the object of the statute to be the furtherance and success of the military and naval operations of the United States in war against the German Imperial Government, and on October 22, 1919, when the penal clause on which the counts are based was enacted, the necessity for such enactment, having passed because of the actual cessation of military and naval operations by the United States in such war, the Congress was without authority or power to enact such penal clause. As enacted, it was and is an invasion of the rights of the States.

2. The section of the amended statute upon which the counts are based violates the sixth amendment to the Constitution, in that it affords a person no standard or criterion by which he can, or could determine whether any act contemplated by him would be violative of the statute; it does not afford a standard, or criterion in conformity to which an indictment based upon the section will, or can advise one, accused under the section, of the nature and cause of the accusation against him; it contains and provides no definition of terms employed so that it can be determined whether an act alleged to have been done is such an act as the section prohibits; it leaves to the determination of courts and juries what the Congress alone can determine within any lawful limitations, conditions, or circumstances.

Wherefore the defendant prays judgment, that the said indictment and each count thereof, may be for naught held and the defendant be hence discharged.

Chester H. Krum,
Louis B. Sher,
For Said Defendant.

Upon submission to the Court this demurrer was sustained, the Honorable C. B. Faris, District Judge filing in connection with his sustaining the demurrer the following memorandum, or opinion showing the ground upon which the demurrer was sustained.

In the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

United States of America,
Plaintiff,
v.
L. Cohen Grocer Company,
Defendant.
No. 7283.

Memorandum of Court on Demurrer to Indictment.

The defendant, a corporation under the laws of the State of Missouri, stands indicted in this court in two counts under the amendment of October 22, 1919, of the Act of August 10, 1917. To this indictment, and to both of the counts thereof, defendant demurs for that both the indictment, which follows the language of the amendment, *supra*, and the amendment itself, are insufficient to inform it of the nature and cause of the accusation against it; and, therefore, that both such indictment and the amendment itself, are viola-

tive of the sixth amendment to the Constitution of the United States.

The language of the statute which attempts to create the crime charged against defendant, so far as that language is pertinent to the specific charge against this defendant, reads thus:

> "That it is hereby made unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in necessities. * * * Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding five thousand dollars and be imprisoned for not more than two years or both." (Sec. 2, Chap. 80, Stat. 1919, amendment of October 22, 1919, to the Lever Act.)

Following the language of the above statute the indictment charges that defendant "did wilfully and feloniously make an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, to-wit, sugar;" and thereupon the indictment proceeds to aver the facts of the alleged sale of sugar, in that it sets forth the date of the purchase, the name of the purchaser to whom said sugar was sold by defendant, the amount of sugar sold, and the price charged such purchaser therefor, and concludes by averring "that said purchase price so demanded exacted and collected for the said granulated sugar by the said L. Cohen Grocer Company from the said R. Heilmann, was and constituted an unjust and unreasonable rate and charge, as it the said L. Cohen Grocer Company then and there well knew."

Shortly before this, in a trial in this court upon a similar indictment against this defendant, at th

clusive of the case, and upon a demurrer *ore tenus*, bottomed upon the alleged insufficiency of the evidence to convict, I took occasion in an oral charge to say to the jury this:

"The act under which this prosecution is being had was approved on the 22nd day of October, 1919, more than eleven months after the signing of the armistice. It is, of course, fundamental, gentlemen, that the constitutional validity of this act depends wholly upon whether, at the time it was passed and approved, a state of war existed between the United States of America and the Imperial German Government. Clearly, in a time of peace, a statute like this could not stand under the Constitution of the United States for a single minute.

"The Federal Constitution is not a limitation upon the powers of Congress, but it is a grant of powers to Congress, and beyond the limits of that grant neither Congress nor any other coordinate branch of the Government had a right to go. Congress has no power to do anything unless power to act, either expressly or impliedly, is conferred by the terms of the organic law itself.

"So, in times of peace, the power to pass a statute like this is to be determined by the question whether the statute falls within the domain of interstate commerce, or within the domain of internal revenue. It must be within the domain of one or the other, or Congress has no power to invade the State's rights and pass it. Very clearly, this statute is not a manifestation of the power of legislation on matters of internal revenue. Just as clearly, in my opinion, or almost as clearly, at least, it is not a matter within the domain of interstate commerce. This is so because this act deals with the commodities that are affected by it after interstate commerce has

wholly ceased to deal with these commodities; after, in other words, interstate commerce has acted and the commodity has come to rest in the State—in this case, in the State of Missouri.

"But since the Supreme Court of the United States in the liquor case has seemingly ruled that a legal state of war, or a legal fiction of war, exists and will continue to exist until the ratification of the treaty of peace with the German Republic, and until the proclamation of that fact by the President, although the Imperial German Government with which the war was declared has ceased to be, I am therefore, bound by this ruling. Consequently, whatever mental reservations I may hold personally I take it that so far as that particular phase of the Constitution is concerned, that the act in question is valid.

"But a most serious question is met after the constitutionality of the statute is settled, upon the point of its invasion of State's rights, the point that I have just been talking about. That question is, whether the act is not too vague, indefinite, and uncertain to be enforced by the courts, and whether by reason of such vagueness, indefiniteness, and uncertainty it does not, in effect, delegate the legislative power which is vested in Congress alone to the courts and to the juries of this country; and, also, whether this act by its existing terms fixes any definite or certain rule by which human conduct can be uniformly governed. In other words, the question arises—a serious question arises: Does it inform the accused of the nature and cause of the accusation against him, as the sixth amendment to the Constitution of the United States specifically and certainly requires? I can not be brought to think so, gentlemen.

"Briefly: This statute makes it a felony for any person—which, I take it, includes a corporation as well—wilfully to make any unjust or

unreasonable charge in dealing in any necessary. It nowhere defines what is unjust or what shall be deemed unreasonable. It leaves it to the jury to find what particular thing it is that the law has made a felony of. One jury might very well say that a profit or charge of one cent a pound on sugar, above cost and carriage, is unjust and unreasonable, and so a felonious act; while another jury might say that a charge of twenty-five cents was not unjust and unreasonable. No criminal statute, gentlemen, ought to be so vague and uncertain as that the citizen cannot at any given moment know whether he is a felon or a patriot.

"In the presence of the existing rapacity and greed of the profiteer, I confess it has been difficult for me to approach this question in a judicial frame of mind. It is to me a matter of most sincere regret that I find it my duty to say, so far as the application of this law to the fact presented in this identical case is concerned, that it is invalid, for the reason I have stated. It is regrettable that a law which was intended to be as beneficent as this law is intended to be, and which was intended and designed to remedy a most outrageous and crying evil, should be found to fall short by reason of constitutional difficulties of the end sought to be attained. There never was a time when a curb of human greed and rapacity was so urgently demanded as it is demanded now, and I repeat, that the abhorrence I feel of the selfish hoggishness of the profiteer is such that I can scarcely deal with the question with the amount of judicial aplomb with which I ought to deal with it.

"But, in my opinion, gentlemen, these considerations do not warrant ruthless overriding of the rights of the citizen to have stated in a criminal statute the certain and definite rights which hedge him about as a citizen, and the certain and

definite definition by which he or his counsel, can ascertain whether or not he is guilty of a felony.

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country. * * *

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

To these views thus orally expressed, I am constrained to adhere, notwithstanding the fact that my attention has been called to certain cases which, it is urged, give color to the contention that statutes equally as vague, uncertain, and indefinite as that here involved have nevertheless been upheld by the Supreme Court of the United States as constitutionally valid. These cases are **Standard Oil Company** v. **United States,** 221 U. S. 106; **Nash v. U. S.,** 229 U. S. 273; and **Waters-Pierce Oil Company v. Texas,** 212 U. S. 86.

The case of **Standard Oil Company v. United States,** *supra*, was a civil proceeding by injunction and for dissolution into its constituent elements for monopolization and restraint of trade, and it was not a criminal proceeding, such as is this at bar. The statute upheld in the Standard Oil case upon an attack analogous to this (or so far analogous as a civil case may

be to a criminal one) were sections 1 and 2, of the so-called Sherman Anti-Trust Act. (Sections 1 and 2 act of July 2, 1890, Chap. 647, 26 Stat. 209). These sections denounced and declared unlawful all monopolies and combinations and conspiracies in restraint of trade. Aiding the view taken in the above case by the Supreme Court of the United States, reliance to a large extent was had upon the ancient common law definitions and crimes of engrossing, and monopolizing. Since the above case was not a criminal one but a civil action, no occasion arose therein for any reference to or consideration by either court or counsel of the provisions of the sixth amendment to the Federal Constitution and none such was made.

Neither was the case of **Waters-Pierce Oil Company v. Texas,** *supra,* a criminal case, but a civil case in the nature of quo warranto. The trial thereof in the Texas State courts was had under certain statutes of that State, which provided as punishment for the violation thereof ouster and the assessment of certain penalties. Not the sixth amendment but that phrase of the fourteenth amendment touching due process of law was alone involved. (Waters-Pierce Oil Co. v. Texas, *supra, l. c.* 11). While the attack involved the alleged vagueness and indefiniteness of the Texas Statutes, these statutes clearly defined a monopoly. (Waters-Pierce Oil Co. v. Texas, *supra, l. c.* 99). For the rest, what is said touching the Standard Oil case, *supra,* applies also to the Waters-Pierce case.

The case of **Nash v. United States,** *supra,* was, however, a criminal case under sections 1 and 2, of the Sherman Anti-trust Act. The indictment in the Nash case was in two counts, one of which charged a conspiracy in restraint of trade, and the other a conspir-

acy to monopolize. It may or may not be a suggestive feature that there was originally also a third count which charged Nash with monopolization. This count was held to be bad on demurrer below and thereafter fell out of the case.

In the course of the opinion in the Nash case it was pointed out that no overt act, nothing, indeed, beyond the bare conspiracy itself, need be either charged or proven; that the Sherman Anti-trust Act punishes the conspiracies at which it is leveled on the common-law footing, and therefore does not make the doing of any act other than the act of conspiracy itself a condition of liability. Thus the Supreme Court justified the statutory crimes and conspiracies to monopolize, and conspiracies in restraint of trade, which are denounced by the Sherman Act by a relegation for their constituent elements back to the common-law definitions of the crimes of engrossing, monopolies and contracts in restraint of trade. (3 Coke Inst. 181, Chap. 85; 1 Hawkins P. C., Chap. 29; 5 and 6 Edw. VI, Chap. 14; Standard Oil Co. v. United States, 221 U. S., *l. c.* 51). Just here the query may logically arise as to where at common law is there any crime defined or denounced as "making an unjust or unreasonable charge in dealing in any necessity?"

After the Nash case was ruled, the Supreme Court of the United States again had occasion to refer to it and distinguish it in a case arising under the constitution and laws of the State of Kentucky. (International Harvester Co. v. Kentucky, 234 U. S. 216). Plaintiff in error in the above case was convicted and fined in the courts of the State of Kentucky under certain statutes passed pursuant to provisions

of the Kentucky constitution, which permitted the legislature to enact such laws as might be necessary to prevent all trusts "from combining to depreciate below its real value any article, or to enhance the cost of any article above its real value." The statutes passed by the Legislature of Kentucky made it lawful to enter into any combination for the purpose of controlling prices, "unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article." The Supreme Court of the United States held that neither the constitution of Kentucky nor the statutes above referred to, and passed pursuant to the constitution, offered any standard of conduct that it is possible to know in advance and comply with, and that such provisions, as a consequence, were invalid. **(International Harvester Co. v. Kentucky,** 234 U. S. 223).

Distinguishing the Nash case from what was said in the International Harvester case, the Supreme Court said:

> "We regard this decision as consistent with Nash v. United States, (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree —what is an undue restraint of trade. That deals with the actual, not the imaginary, condition other than the facts. It goes no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach, and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil

side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223).

While no reference was made by the Supreme Court in the above excerpt to the fact that common law crimes (which form the very foundation stones of the offenses denounced in the Sherman Anti-trust act) were being dealt with in the Nash case, it is yet clearly obvious that the distinguishing features, as between the two classes of cases, brings this case into that class represented by the Kentucky Statutes, rather than the common-law class represented by the Nash case. Indeed, upon principle, I am unable to distinguish the instant case from the Kentucky one. No man would engage in business, and no self-respecting man would remain in business, if his fortune, good name, or liberty is to be determined solely by the heated and prejudiced views of what is unjust and unreasonable which may be entertained by a jury personally embarrassed and harrassed, it may be, by the inordinate rise in prices of all commodities. Such a law may be fit for the trial of the guilty; but laws ought to be fit both to try the guilty and the innocent. A law which is fit only to try those who are guilty necessarily begs the question of guilt, and is, therefore, no better than lynch law.

The definitions, boundaries and limits of a criminal statute ought at least, to be so clear that no man in his right mind can be in doubt when he is violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question of criminality.

If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act, shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which is here in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefinitteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

For these reasons, and for others which I might

add if leisure allowed, I think the demurrer to the indictment ought to be sustained.

C. B. Faris,
District Judge.

In this connection the learned judge might have observed that two acts, one **penal**, the other **remedial**, cannot be construed in **pari materia**. **U. S. v. Anderson**, 9 Wall 56, 19 L. Ed., 615, 6-8.

Thereupon the plaintiff in error prayed the allowance of a writ of error to this Court on the decision thus rendered upon the demurrer; the petition for the writ being based upon the following assignment of errors:

> First, that the Court erred to the injury of the United States of America in sustaining the demurrer filed by defendant to the indictment, and to each count thereof, in this cause, on the ground that that portion of section 4 of the act of Congress approved August 19, 1917, as amended by the act of Congress approved October 22, 1919, entitled, "An act to amend an act entitled 'An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel,' approved August 10, 1917, and to regulate rents in the District of Columbia," upon which said indictment is predicated, is unconstitutional and invalid, and by entering a judgment discharging defendant herein from all criminal liability under said section of said act;
>
> Second, that the Court erred to the injury of the United States of America in its construction of said section of said act by its decision and judgment in sustaining said demurrer to the indictment in this cause;

Third, that the Court erred to the injury of the United States of America in sustaining, and not overruling, said demurrer to the indictment in this cause;

Fourth, that the Court erred to the injury of the United States of America in deciding said demurrer to the indictment against the plaintiff and in favor of the defendant.

The writ of error as prayed was allowed and under the statute the issue decided in the District Court is now presented to the determination of this Court upon the record thus made.

POINTS AND BRIEF.

The indictment does not state facts, sufficient to constitute an offense.

I.

The Statute, October 22, 1919, amendatory of Act March 10, 1917, S. 4, as imposing a penalty, is void.

Penalizing by Congress a private intrastate sale made under the conditions of the indictment is beyond the prerogative of Congress.

> In a state of mere theoretical war between the United States and some other nation, it is beyond the power of Congress to impose a basis of prices to govern a sale of even a food made intrastate by one private person to another, in which sale the government has no interest, which sale has no concern with interstate commerce, or Internal Revenue and by which sale the United States can be affected in no manner or degree.

Powers not delegated to Congress are reserved to the States or the people. An enactment by Congress which encroaches upon undelegated powers of the States is beyond the powers of Congress and void.

The Constitution is a law for rulers and the people equally in war and in peace. It protects all classes of men, at all times and under all circumstances.

Ex parte **Milligan**, 4 Wall 121.

Framers of Constitution did not intend to restrain

States in regulation of civil institutions adopted for internal government.

Dartmouth v. Woodward, 4 Wheat, 518, 629;
Hammer v. Dagenhart, 247 U. S. 251, 62 L. Ed. 1101, 1107.

Illustrative distinction made in proclamation of emancipation—between **Missouri** not in rebellion and **Georgia** and other States in rebellion.

Discussion In Argument.

True that private contracts must yield to public welfare when appropriately declared and defined.

Dry Goods Co. v. Service Corporation, 248 U. S. 372, 63 L. Ed. 314.

No absolute freedom to do as one wills, or to contract as one chooses. Liberty is not mere license.

C. B. & Q. v. Maguire, 219 U. S. 567, 55 L. Ed. 338.

Settled that all contracts and property rights are held subject to the fair exercise of the State to prescribe regulations for the general welfare.

Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558, 58 L. Ed. 721, 726.

But consideration of these familiar rules in case of penalizing by the United States of merely local contracts in which government has no concern, must depend upon a degree of necessity resulting from the proximity of a peril, or danger to the general government itself.

We are, of course, sensible of the fact that it is only in cases where legislative power has been clearly transcended in declaring that to be law which is not within legislative competency, that courts are justified in declaring any particular provision of an act of Congress void and without affect. But there are certain fundamental rights of person and property that are beyond the power of Congress to disregard or violate. There are certain fundamental maxims of a free government that would seem to require that the rights of personal liberty and private property should held sacred. At least no court of justice in this country would be warranted in assuming that power to violate and disregard them lurked under any general grant of legislative authority or ought to be employed from any general impression that may be found in any of the articles of the Constitution. These are pharaphrased observations of the District of Columbia Court of Appeals in **Stotenberg v. Frazier**, 48 L. R. A. 220-224. The Supreme Court of the United States has also observed that the legislature may not under the guise of protecting the public interest arbitrarily interfere with private business or impose unusual and unnecessary restrictions on such lawful occupations. In other words, a determination by it as to what is a proper exercise of its police powers is not final or conclusive but is subject to the supervision of the courts. **Lawton v. Steele**, 152 U. S. 133-139, 38 L. Ed. 385-389. Such a line of observation applies as well to Congress.

The instant case.

Indictment charges two independent sales of sugar to two private persons at "unjust" and "unreasonable" prices.

No government concern in sales alleged. No

need of sugar by government alleged. No feature of Interstate Commerce or Internal Revenue alleged. No fact alleged of governmental interest, or concern.

State of war between United States and Germany alleged to be then existing.

But,

Conceding sugar to be a food, or a necessity—a thing essential to human life—yet to justify on the ground of war an invasion by the government of the right of a State to impose conditions upon sales within its borders as it sees fit, such war must be an actual, not a theoretical war existant merely because the President had not proclaimed that it had come to an end.

Discussion In Argument.

II.

The indictment merely states conditions of Statute which deprive citizens of life, liberty and property without due process of law.

Due process of law, the law of the land.

Davidson v. N. O., 98 U. S. 97;
Mo. Pac. v. Haines, 115 U. S. 512, 519;
Scott v. Toledo, 36 Fed. 385 L. L. R. A. 686.

Phrase imports in general a public law equally binding upon all persons and classes alike.

Statute, however, excepts

farmers, gardeners, horticulturists, vineyardists, planters, dairymen, stockmen, and any kind of **agriculturist.**

This is a merely arbitrary exemption—a merely arbitrary exercise of governmental authority.

Giozza v. Tiernan, 148 U. S. 657.

Discussion of Point In Argument.

The case would deprive defendant in error of property without due process of law and hence the amendment is void.

III.

The amendment, no less than the original Statute violates Article VI of the Amendments to the Constitution. Neither original Statute nor amendment inform the accused of the nature and cause of the accusation.

> Laws which create crime ought to be so explicit that all men subject to their penalties may know what act it is their duty to avoid.
>
> **U. S. v. Brewer**, 139 U. S. 278;
> **Tozer v. U. S.** (C. C.), 52 Fed. 917.

Statute—"**unjust**" or "**unreasonable.**" No standard of determination in Statute of unjustness or unreasonableness.

Discussion In Argument.

Standard Oil v. U. S., 221 U. S. 106;
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

Both civil cases have no bearing on question.

Nash v. U. S., 229 U. S. 373, distinguished by this Court in **Harvester Co. v. Kentucky**, 234 U. S. 223.

Foregoing cases relied on by government for reversal. Neither affords ground.

Finally—Argument of Judge Faris in opinion on the demurrer below unanswerable.

Judgment should be affirmed.

ARGUMENT.

Proceeding upon the assumption necessitated by the Criminal Appeal Statute, that the only question open in this court upon this writ of error is whether the Statute attacked below upon demurrer is a valid Statute, counsel for defendant in error respectfully submit:

The following provision of Section Four of the Act of August 10, 1917, C. 53, as amended by the Act of October 22, 1919, C. S. 2:

> "It is hereby made unlawful for any person to wilfully . . . . . 'make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.'" . . . . .
>
> "Any person violating any of the provisions of this section upon conviction thereof shall be fined," etc.,

is invalid as violative of the Constitution and as going in its enactment beyond the powers of Congress.

This broad proposition involves two questions:

1. In a state of theoretical war between the United States and some other nation, it is beyond the power of Congress to impose a basis of prices to govern and control a sale of even a food, made intrastate by one citizen, or private person to another citizen or private person and in which sale the government has no interest, and which bears no relation to Interstate Commerce or Internal Revenue, and by which sale the United States can be affected in no manner or degree.

2. The enactment violates Articles V and VI of the Amendments to the Constitution.

The provision of the Statute which is involved upon this record, violates both of these amendments.

In the court below, only the question as to the Sixth Amendment was considered, but the other questions are involved and presented upon the record now before this Court. While the burden of the case is now upon the government, counsel for defendant in error nevertheless will proceed as if that burden rested upon them, rather than upon the other side. Their brief and argument are submitted on this theory.

Counsel therefore submit.

1. **The enactment is wholly beyond the authority and power of Congress.**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Constitution commands the United States to guarantee to each State a republican form of government.

In view of the amendments cited and in view of the reservation of powers to the States and the guaranty to each State of a republican form of government, the question, now presented, is how can a Statute of the United States be valid which denounces as a felony a sale of necessaries of life in a State by one private person to another private person in the same State at a price characterized by the Statute as being unjust, or unreasonable? How can such a Statute be valid, when the sale is one in which the government has no interest, either by way of inter-

state commerce, or revenue internal or by way of duties on imports or exports? It must be conceded, that in a time of peace there could be no doubt, that such a Statute would be void. But in the present case, the contention is that war existed when the enactment was had and therefore it must be upheld as necessitated by such war.

For the present the absence of a standard of determination as to justness or reasonableness need not be considered.

Upon this record, the indictment affords the facts of the situation. There is no condition of interstate commerce, no condition of internal revenue. Nothing of such description modifies, qualifies, adds to, or takes from the situation. So by reason of the absence of averment on the subject, it is admitted that the government had no interest whatever in the sale.

A grocer corporation in St. Louis, Missouri, sells to a person in that place one hundred and fifty pounds of sugar at prices evidently satisfactory to both seller and purchaser. Each count of the indictment declares upon a separate transaction—the first covering a sale of about fifty pounds of sugar at 20¼ cents per pound and the second covering a sale of about one hundred pounds at 19½ cents per pound. The transaction is purely an ordinary private sale of personal property. It is nothing more. The government is not concerned in and has no connection with the transaction. The terms of sale were of mutual agreement. The government was not a party, or a contemplated party. No part of the commodity went to the government, or was intended for the government.

The government does not even need for any purpose one grain of the commodity sold. The government is not even in the market for sugar, but there is a condition of war obtaining in Europe, which had been terminated in point of fact when the penalty was imposed but not in point of law merely because the President had not, by proclamation, declared the war to have come to an end. That is, the continuance of the war is to be predicated upon the absence of the presidential proclamation.

The provision of the Statute which now affords the penalty invoked against this intrastate, local and private sale, was imposed after the war had, in fact come to an end, and after the troops of the United States of America had been either withdrawn from the fields of war, or had put their guns of mammoth calibre in such an innocuous condition, that they could not be used even in the manufacture of puffed breakfast food. An armistice was signed as early as November, 1918. From that day no gun was fired by the United States against hostile forces of a public enemy.

But by a statute enacted **without penalty** when the war was in fact and law "on," but amended **with penalty** after the war **in fact** had ended, but **in legal fiction** had not ended, sales in which the government had and could have no concern are now sought to be penalized, because the price of the commodity was "unjust" or "unreasonable."

The Supreme Court of the United States (after an argument of great power by Jeremiah S. Black, which it was the good fortune of the writer of this brief to hear and by which he was most deeply impressed, declared: **Exparte Milligan**, 4 Wall. 2, 121—

> The Constitution of the United States is a law for rulers and people, equally in war and in peace and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man that that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence.

No greater exigency had ever threatened the government than the war of the Rebellion. The life of the Republic hung on the balance during those years of internecine strife. Even the felon shot that wounded the captain at Antietam was fired by a brother American's hand. In the very midst of loyal homes, the spirit of treason stalked—giving aid and comfort where it dared not openly rebel. Yet actual war was not prevailing in a given locality but the shield of protection of the Constitution covered in that locality, in so far as courts were concerned, even one of traitorous purposes; civil, not martial law prevailed and controlled except where civil courts were actually closed by invasion or locally existing war.

Allusion has been made to Antietam. Counsel avail themselves of conditions then existing to illustrate the force of the contention, that not even a state of war in Europe to which the United States, at one time was a party can justify interference by the government with private contracts local to a State of the

United States and in which the government has and can have no interest whatever.

Slavery in the United States was purely an institution local to the State where it obtained. Massachusetts gave it up, because it did not pay. Georgia and States which thought they seceded, kept it and went to war for it, because the invention of the cotton gin made it pay. The National Government of 1861 sought to save the Union, by suppressing a senseless rebellion. The purpose was not to overthrow or interfere with the established institutions of States which had seceded, as it was termed, and whose slave owners were in rebellion, but to maintain the Constitution and preserve the Union. The **captain** who was struck down at Antietam, will recall conditions then obtaining from personal observation and experience. But may it not be pertinently inquired of this Court:

> Why was it, that when Missouri was not in rebellion, but Georgia was, Congress, at the instance of Mr. Lincoln, endeavored to provide for "gradual emancipation" in Missouri on a basis of compensation to slave owners, while the same body stood ready to sustain the President and did sustain him in his proclamation of freedom to slaves in States in rebellion, issued September 22, 1862, five days after Antietam?

The proclamation was necessitated by the exigency of war. It was conceived that the end of slavery in States in rebellion would end the war of that rebellion. Missouri was not in rebellion, hence her slaves were not then freed—the necessity did not exist in Missouri. Whatever may be said of the proclamation of emancipation as a valid measure in general, it was

issued as a war measure. It was of vital concern to the United States. It was issued by virtue of the war power of the President. It was necessitated by the fact of rebellion. Its issue was one cause of the failure of the rebellion. Yet Mr. Lincoln carefully discriminated between localities—States and parts of States—where slavery should be abolished, because of the necessities of war waged against the United States in such States and parts of States, and States where rebellion did not dominate local processes and conditions. Neither George Ticknor Curtis, nor Horatio Seymour stood for a closer observance of the solemn admonitions and reservations of the Constitution than did Abraham Lincoln in distinguishing between States, where the people of some were and the people of others were not in rebellion.

Counsel respectfully submit that the episode of emancipation affords the strongest possible exposition of the reservation of power in the States over their purely local and domestic affairs. It is respectfully submitted farthermore, that speaking through the **captain** of Antietam's field, this Court has observed the distinction now contended for in **Schenck v. United States**, 63 L. Ed. 470, 473. Disloyal utterances are not treason, but when they directly affect the necessities of the government in time of actual war, they may be punished by the law powers of the government. The learned Jurist speaking for this Court profoundly declares the question to be one of proximity or degree. But war to justify a temporary suspension of true State rights, must be actual war—not one ended in fact, but theoretically continued by a limitation, or condition of an Act of Congress not in itself declaring war.

"The framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions adopted for internal government." **Dartmouth College v. Woodward,** 4 Wheat 518, 629.

As was said in **Hammer v. Dagenhart,** 62 L. Ed. 1101, 1107, to sustain this Statute would sanction an invasion by the Federal power of the control of a matter purely local in its character and over which no authority has been delegated to Congress. It is the necessity of fact, not a statutory extension of a fictitious existence which is the test to which this Statute must be subjected.

This record makes a clear and strong case for appeal to the protection of the Constitution.

There is no question here of proximity or degree. Whatever may have been a supposed exigency in 1817, when Section 4 of the Act of March 10, 1917, was enacted without penalty as to unjust and unreasonable prices in private sales of foods or necessaries, there was no conceivable exigency when a penalty was added by way of amendment by the Act of October 22, 1919.

The war with Germany was ended. A treaty of peace with Germany had been negotiated by the President and he had submitted it to the Senate for their concurrence. All of this had been done in the name of peace before this penalty was imposed.

One further condition obtained as a fact on October 22, 1919. The Hun was not at our door. We could slumber without fear of being murdered in our beds. Peace reigned in Warsaw. It reigned no less in these United States of America. There was no existent

emergency, no existent peril. Were it not for the parliamentary decorum which requires one to speak guardedly to one branch of the government of the proceedings of a co-ordinate branch, one might say that the very preamble of the Statute as amended in 1919 is untrue. It was not by reason of the existence of a state of war that it was essential to the national security and defense, or for the successful prosecution of the war, or for the support and maintenance of the Army and Navy, or to assure an adequate supply and equitable distribution, or to facilitate the movement of foods, or to prevent locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulation and private controls affecting such supply, distribution and movement, or to establish and maintain governmental control of such necessaries during the war, that the extraordinary provision of the Statute (the penalty imposed for the first time) was enacted. Whatever may have been the need in 1917; in October, 1919, there was none.

There was no national defense to be maintained. The **necessity** for it (if we are to be controlled by such condition), did not exist. There was no war to be successfully prosecuted because the craven hearted foe begged for peace upon bended knee and hostilities had been, in fact permanently ended; no army or navy needed to be supported, or maintained upon other than a basis of peace; no adequate supply and equitable distribution of foods was necessary to be assured **by the United States**; no movement of foods was necessary to be facilitated **by the United States**, and there was no war during which monopolization, hoarding, injurious speculation, manipulation and private controls were of necessity to be prevented be-

cause of their hindrance of some operation of the government and there was no war during which it was necessary to establish and maintain governmental control of foods, feeds, wearing apparel and containers primarily designed to contain foods, feeds or fertilizers.

"Peace is always beautiful," but the poet builded far worse than he knew, because a peace won by the United States will have been marred by a sorry, woeful blemish if this infraction of the Constitution is sustained as a valid enactment of the Congress of the Republic—the Congress an invader of the reserved rights of the States in a time of actual peace.

Counsel are not aware of any departure from this basic rule by the Court which from the adoption of the Constitution has proclaimed it to be and sustained it as evidencing the most sublime ordinance enacted by a free people in the history of civilized mankind.

Counsel do not concede, that sugar is a food, or that it is necessary to human life, in that it is a commodity without whose use human creatures cannot exist. They contend, that sugar is not a food—it is not even declared to be such by the Statute. They contend, that it is not a necessary—it is not so declared to be by the Statute. Such a consequence if it may be reached, of course must end the inquiry upon this writ of error. It is not a food by reason of some proclamation of the President of the United States. Even in time of war the President cannot legislate and a proclamation declaring something to be a food, or a commodity necessary to human existence is beyond his power or discretion. On this subject, it was for Congress to legislate. The proclama-

tion alone declared sugar to be a food. The President legislated, the Congress, alone empowered if at all, did not legislate.

But counsel take no narrow view of this Statute upon this point. Their contention is the broad view of the Constitution.

Sales of articles of food, local to a given State, are to be governed by the laws of the State, unless they fall within the purview of Internal Revenue. Armies were said by Napoleon to travel upon their bellies and food to an army is a necessity. But under our system of government, unless an exigency of war exists locally in a given State and the government even needs an article of food dealt in in such given State, but the price does not affect the government at all then whether the article shall be sold at a "just" or "reasonable rate" between individuals is for the State to settle and not for Congress.

Counsel have found upon this record, as has been indicated, no question of proximity or degree. It is true, that private contracts must yield to the public welfare when the latter is appropriately declared and defined. **Union Dry Goods Co. v. Georgia Public Service Corporation**, 248 U. S. 372, 63 L. Ed. 314. But there must at least be some proximity to exposure of public welfare to a recognizable, possible peril, before considerations of public welfare can override considerations of private right.

There is no absolute freedom to do as one wills or to contract as one chooses. Liberty implies the absence of arbitrary restraint not immutable from rea-

sonable regulations and prohibitions imposed in the interest of the community.

C. B. & Q. R. R. v. Maguire, U. S. 367, 33 L. Ed. 338.

Yet whether regulations supposed to impinge upon freedom to do or contract, are reasonable must depend on the proximity of some peril or exigency to which they are applicable.

So it is settled, that all contracts and property rights are held subject to the fair exercise of the power of a State to establish all regulations necessary to secure the good order, comfort or general welfare of the community of that State.

Coast Line R. R. v. Goldsboro, 232 U. S. 548, 558, 58 L. ed. 721, 726.

Yet the government of the United States must guarantee to each State a republican form of government. The people of the State must be free to act within the purview of reasonable regulations imposed by the State. No other consequence can there be from a government in form, or fact, republican. The necessary and unavoidable consequence must be, that each State of the United States must be left free to impose its own regulataions upon prices and sales of commodities in its own territory and this right cannot be impinged upon, qualified, suspended or impaired except by reason of a present exigency, or unquestionable danger to the institutions of the general government. And even as to this, there is doubt.

The moving right to interfere can only be necessity. The power of restraint open to the general

government must depend upon the necessities of the government, for instance in a war which may imperil that government. But if there is no actual war, there is no peril and if there is no peril, there is no necessity of protection from a threatening peril. There is none against which to provide.

Upon such an issue as is joined upon this record, one must look at facts and substance rather that at fiction or directory provisions of Statute. Counsel therefore submit, that when the Armistice was signed in November, 1918, when the Army and Navy of the United States were recalled and put upon a peace footing; when the President of the United States, as was his right and duty, proceeded to negotiate a treaty of peace; when the general government proceeded to sell its stores, supplies, equipments of war, fouls, feeds and necessaries of war; when, if you please, the existence of peace was proclaimed by the whole people with the noise, furore, wild enthusiasm and exuberant joy of John Adams' Fourth of July celebrations, the war declared by the Congress April 7, 1917, was ended as far as concerned private contracts between private individuals and wholly local to the State written which they were made. There was no impending peril to the general government. There was no need of legislation aimed merely at private contracts and dealing between private persons in any State, which concerned neither Interstate Commerce, nor Internal Revenue.

Counsel likewise submit, that the provision of the Act of August 10, 1917, that its enactment should cease to be in effect when the existing State of war between the United States and Germany had termi-

nated, which fact and the date of such termination should be ascertained and proclaimed by the President was merely a provision to be effective upon the existence of a condition of fact (the proclamation of such existence being merely directory); that such fact having supervened before the amendment of the Statute, then was war at an end, no necessity for the amendment existed and its then imposition of a penalty was unenforcible and void.

If the fact of cessation of war, declared in 1917, cannot now be determined as a fact existing in October, 1919, for the purpose of concluding whether Congress could then penalize **lawful** private contracts made **intrastate**, because the President had not then **proclaimed** the war to be at an end, there is room for further legislation, by way of amendment to the Act of March 10, 1917, which will even more arbitrarily intrude upon the reserved and undelegated powers of the States. There can be no limit to such legislation, but Presidential will.

Counsel have not failed to consider the ruling of this Court in **Hamilton v. Kentucky Distilleries**, Nos. 380 and 602. The question presented **there** is not that **now presented**.

Here, a statute, enacted in August, 1917, when a state of war undoubtedly and actually existed, recited, that **"by reason of the existence of a state of war"** it was **essential to the national security and defense "for the successful prosecution of the war"** and for **"the support and maintenance of the Army and Navy"** to assure an adequate supply and equitable distribution of foods, feeds and other commodities mentioned in the Act, and by Section 4 made it

unlawful to make an "unjust" or "unreasonable" rate in handling necessaries, but denounced no penalty and created no offense for or in the doing declared to be unlawful. This Act was amended October 22, 1919, by adding in Section 1 "**wearing apparel and containers primarily designed or intended for containing foods, feeds or fertilizers,**" but leaving the recital of the necessity unchanged; and by denouncing for the first time in Section 4 the felony now sought to be punished.

The Court observes at once, that what may be termed the limitation clause of Section 24, which remains unchanged, can have no influence in determining whether the penalty imposed by the amendment can be enforced. The question of **proximity** or **degree** was presented October 22, 1919. Did the necessity **then** exist? Was it **then** necessary to invade the rights of States; then necessary to the national security and defense; then necessary for the successful prosecution of the war and then necessary for the support and maintenance of the Army and Navy to enact the penalty for an act lawful within the given State, but to be regarded by some uncertain, indefinite and indefinable standard as unjust or unreasonable? Counsel lay no stress upon the declarations of necessity in the First Section of the Statute. They neither added to, modified, qualified or detracted from the Act. If the necessity existed when the Act was passed the question of proximity or degree was answered. But if the necessity did not exist when the punishable offense was first created by the amendment of October 22, 1919, no question of proximity or degree was presented and

Congress could impinge upon the rights of States only in defiance of the Constitution.

Counsel, who prepared this argument, yields to none in his espousal of the war against Germany and in his recognition of all of its dire necessities. He deprecates, however, as all Americans should, all scare-crow absurdities of law, or want of law which infected our people for a time as cholera morbus disturbs the normal function of the descending colon, but he deprecates still more, vastly, indescribably more a declaration by any National Court, that on October 22, 1919, there existed a necessity for the invasion of the rights of States vigorously reserved to themselves by the express limitations of the Constitution.

One concedes, as he must, that where an enactment is within the scope of power legitimately to be exercised by Congress, the necessity for the legislation is, as a rule, to be determined by the legislative branch of the government. But this concession depends upon the legitimate exercise of the power. Where, as here, when the original Statute was passed, there may have been need of it, because the operations of the government might in some way have been affected by existing war, yet, as here again, when the Statute was amended and an offense for the first time thereby denounced, there was no need of the enactment, so far as concerned the government, and it was not necessitated by any public exigency the judicial branch will not hesitate to annul the legislative action, as would be its prerogative and duty.

The proposition discussed may therefore be thus disposed of:

Dealing in necessities of life, or foods thus necessary, can in general be lawfully controlled by Congress, only where it falls within the domain of Internal Revenue, or Interstate Commerce. The power of such control remains reserved to the States unless some exigency threatening the existence or operation of the National government is immediately proximate, or actual existent. Even this concession is open to serious question.

The Amendment of October 22, 1919, for the first time, and as of that date, denounces an offense to be evidenced by an act of dealing within a State by citizens of that State upon terms lawful under the laws of that State and agreed upon by the participating parties. The offense denounced comes neither within Internal Revenue regulations, nor conditions of Interstate Commerce. No exigency of actual war exists and there is no other public exigency even proximately threatening the National government.

To say, that the so-called Lever Act might be amended October 22, 1919, so as to create an offense for the first time out of a transaction, neither within the domain of Internal Revenue, nor Interstate Commerce, merely because the President had not proclaimed the war with Germany to have ended, would be to determine that Congress may continue to usurp the reserved powers of the States, if Congress so determines, even until the crack of doom.

No Congress may ever repeal the Lever Act and no President of the United States may ever proclaim the war with Germany to have ended. Congress has not provided **when** the President **must** proclaim. **Idcertum**

est quod certum riddi potest. But suppose he never proclaims?

Every consideration of the limited powers of Congress cries out against the possibility of monstrous consequence, if the theory of the Amendment and the indictment is sustained.

Counsel further submit that the penalty sought to be imposed by the amendment of October 22, 1919, cannot be enforced. The amendment, as applicable to the indictment is void.

1.— It violates Article V of the Amendments to the Constitution.

No person shall be deprived of life, liberty or property without due process of law. It is matter of hornbook law, but what is "due process of law?" The inquiry is answered by the courts as finding in the words "law of the land" one equivalent of this phrase "due process of law." **Davidson v. N. O.**, 96 U. S. 97; **Mo. Pac. Ry. v. Hames**, 115 U. S. 512, 519; **Scott v. Toledo**, 36 Fed. 385, 1 L. R. A. 686.

It is a familiar rule, that the phrase imports a general public law, equally binding upon every member of the community, which embraces all persons who are in or may come into like situations. A law which operates partially and upon certain classes alone, exempting others enumerated, and makes distinctions which on their face are arbitrary and capricious is not a valid enactment as being the law of the land—"due process of law." Tested by this familiar rule the Amendment of October 22, 1919, of the Act of August 10, 1917, is void.

By this Amendment one who makes an "unjust" or "unreasonable" rate or charge in handling or dealing in, or with any necessaries" in purely private transactions commits a felony, providing he is not a **farmer** or a **gardener**, or a **horticulturist**, or a **vineyardist**, or a **planter**, or a **ranchman**, or a **dairyman**, or a **stockman**, or some other kind of **agriculturist**, with respect to the

farm products produced or raised upon land owned, leased or cultivated by him.

A **wholesale grocer** sells **intrastate** at an "unjust" rate, or an "unreasonable rate," sugar produced upon land owned by **sugar planter A** at the peril of a sojourn in the penitentiary; but **planter A** may sell the same product of his own land at a price which will satisfy the most greedy and consuming appetite of the most unscrupulous profiteer!

A **packer of meats** sells intrastate at an "unjust" rate, meats packed by him from cattle of a **ranchman** at the peril of observing the difference between Atlanta's penitentiary and the New Willard, but the **ranchman** may sell with impunity the same kind of meats at prices as unjust as the avarice of man can imagine or devise. And thus one may proceed down the list of classes of persons to whom the amendment penalizing intrastate contracts shall not apply. The illustrative employment of the term "unjust," for the present, assumes that the Statute creates a standard of determination as to injustice, or unreasonableness, which counsel do not, however, concede.

Now, "due process of law," within the meaning of Amendment V is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. It certainly is wanting if the law does not operate on all alike, and does subject the individual to an arbitrary exercise of government powers. **Giozza v. Tiernan**, 148 U. S. 657.

Commentators on the Constitution say that the United States are not by the Constitution expressly forbidden to deny anyone the equal protection or

the laws, but that it would seem that the broad interpretation which the prohibition as to due process of law has received is sufficient to cover very many of the acts which if committed by the States might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments declared against particular individuals or corporations or classes of such without any reasonable ground for selecting them out of the general mass of individuals or corporations amount to the denial of due process of law as far as their life, liberty or property is affected. One of the requirements of due process of law as stated by this Court is that the laws must operate on all alike and not subject the individual to the arbitrary exercise of the powers of government. Accordingly it is respectfully submitted that where this Court encounters a Statute which, as does the Statute now being considered, separate and distinguish a class or classes of individuals from all other classes of individuals and relieves such separated classes from liability for the commission of the same acts for which other classes are held responsible it is the obvious duty of this Court to declare such a Statute to be invalid, unenforceable and void. It is fundamental that whenever the government undertakes to deprive a person of his liberty as a punishment for crime it can only do it by virtue of a valid constitutional statute defining the crime. The Statute upon which or by which a person is deprived of his liberty is a part of the process of law which is used against him and it must be such process of law as is consistent with and sustainable under the law of the land. In **Murray's lessee v. Hoboken Land Company,** 18 Howard 272-276, an adjudication which the trend of events seems to bring forward for con-

stant reference, it is said that the provision of the Constitution now being considered is a restraint on the legislative, as well as on the executive and judicial powers of the government and cannot be so construed as to leave Congress free to make any process, due process of law, by its mere will.

Counsel venture to indulge themselves in no degree of despair with reference to the outcome of conditions which are now said to surround the people of the United States with reference to the situation of their government under the Constitution.

Counsel do not concede that the time has come in which citizens are forced to take refuge in the mandates of the Supreme Court of the United States under the Constitution, as having been deprived of every other refuge to which an honorable appeal can be made with any hope of salvation or relief. Yet this amendment of October 22, 1919, may lead the way to more direful, unconstitutional monstrosities.

There can be no necessity of war, or otherwise, which can justify an enactment by Congress, that if a merchant sells at an unjust rate he commits a felony, but that if any kind of an agriculturist does the same thing he shall go scot-free. There is no law of this free land which can lawfully penalize one, and, for the same act, expressly exempt another.

I am not a Virginian, said Patrick Henry, but an American. He was not in favor of the Constitution, but he preferred death to loss of liberty. In the spirit of that day, unending as the Constitution, counsel submit, that the liberty of the citizen, his equality with his fellows before the law as safeguarded by the Constitution is of greater worth than all the victories of war.

Proceeding with the argument we now come to the ground upon which the Court below sustained the demurrer to the indictment.

2. The Statutory Amendment violates Article VI of the Amendments to the Constitution.

One, of course, thinks well of the bridge which safely bore him over the stream; and one very naturally shows that he was duly impressed by the judgment of a trial Judge in his favor when upon error that judgment is attacked. Yet counsel, with the whole bar at his court, ventures to express the obligation of the community of the Eastern District of Missouri to the trial Judge for his fearless and conclusive demolition of this peculiarly abnormal Statute.

> It is hereby made unlawful * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries * * *. Any person violating any of the provisions of this section upon conviction, thereof, shall be fined not exceeding $5000, or be imprisoned for not more than two years or both.

Provided, he is not a farmer stockman or "other agriculturist!"

Indeed, counsel might perhaps with the better judgment, leave the discussion of this remaining question to the convincing opinion of he learned Judge who sustained the demurrer. Counsel, nevertheless, venture to suggest:

> "In all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation;

which is a provision daily invoked in all courts of the Union and under which this Court has gone further in maintenance of individual right, than any court in Christendom. To inform one accused of crime of the nature and cause of the accusation is to not only find against him a good and sufficient indictment, but is to base that indictment upon a Statute which is so clear and certain, that the accused, can determine for himself, as his Honor Judge Faris quaintly observes "whether he is a felon or a patriot." "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. **United States v. Sharp** Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the Statute. **United States v. Lacher**, 134 U. S. 624, 628."

United States v. Brewer, 139 U. S. 278, 35 L. Ed. 190.

The criminality of an act, said Justice Brewer on the Circuit, cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty." **Tozer v. United States** (C. C.), 52 Fed. 917.

Now, what information does either indictment or Statute give the accused upon this record? Of course, we are limited in the inquiry to the Statute and what information does it give? What is an **"unjust"** rate —what is an **"unreasonable"** rate? By what standard shall the accused judge himself? He must have some standard by which he can determine the unjustness, or the unreasonableness of his act. This amendment provides him with none. This Court has

observed from the record, that Judge Faris first had the infirmity of the Statute brought to his attention at a trial before a jury. He appreciated, at once, the force of the **ore tenus** suggestion, that the Statute was invalid. It is not out of line, to indicate, that Judge Faris proceeded to hear the evidence permitting a wide range of inquiry so as to determine whether there was, or could be an offense. The question of justness, or reasonableness was the gist of the controversy. How could it be determined? A wholesale grocer was permitted to express his opinion on the subject. What else could be done? He thought a price some cents below the price of such sale would have been a fair price, or would have afforded a fair or reasonable profit.

Now the dilemma in which this incident put judge, jury, defendant, United States Attorney and defendant's attorney was as absurd as it was formidable. What if Tompkins, wholesale grocer, thought defendant's price was unjust; what of it? It still remained for the jury to find the fact and they were not bound to regard Mr. Tompkins' opinion as conclusive. In fact, they were not bound to credit him at all, even in the absence of countervailing testimony. Furthermore, how could the Judge charge the jury? What had been furnished the jury in that opinion of the witness to enable them to determine beyond a reasonable doubt, the guilt of the defendant? If the case had gone to the jury, and if the jury had found against the defendant, they could have enjoyed only the consoling reflection:

> From ignorance our comfort flows,
> The only wretched are the wise.

Accordingly, Judge Faris, having duly animadverted upon "profiteering," told the jury:

> "Congress alone has power to define crimes against the United States. This power cannot be delegated to the juries of this country. Therefore, because the law is vague, indefinite and uncertain and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid and that the demurrer offered by the defendant ought to be sustained."

Now, upon the present record, the government sought on the demurrer to the indictment to sustain the statute upon the authority of **Standard Oil Company v. United States**, 221 U. S. 106; **Waters-Pierce Oil Company v. Texas**, 212 U. S. 86—both civil cases having no application to the present case—and **Nash v. United States**, 229 U. S. 373, a criminal case. The contention is here reviewed upon the present writ.

But the issue joined here cannot be determined by the two civil cases neither of which involved the validity of a Statute under the Sixth Amendment. The **Nash Case** was clearly distinguished by this Court in **Harvester Company v. Kentucky**, 234 U. S. 223, where it is said:

> "We regard this decision as consistent with **Nash v. United States** (229 U. S. 373, 377), in which it was held that a criminal law is not unconstitutional merely because it throws upon men the risk of rightly estimating a matter of degree—what is an undue restraint of trade. That deals with the actual, not the imaginary,

condition other than the facts. It does no further than to recognize that, as with negligence, between the two extremes of the obviously illegal and the plainly lawful there is a gradual approach and that the complexity of life makes it impossible to draw a line in advance without an artificial simplification that would be unjust. The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy for common sense to keep to what is safe. But if business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (234 U. S. 223.)

Counsel could no better conclude this discussion of this question than in the inspiring, calm and judicial utterance of the trial Judge below:

> The definitions, boundaries, and limits of a criminal statute ought, at least, to be so clear that no man in his right mind can be in doubt when he is violating and when is not violating such statute. There ought not to be necessary any chopping of logic or intricate reasoning from cause to effect in order to decide the question criminality.
>
> If this law is to stand, then no longer would there seem need of defining crimes by separate statutes. All that will be necessary will be to pass a single sweeping statute, declaring that any person who shall commit any unjust or unreasonable act, or any wrongful or criminal act,

shall be deemed guilty of a felony; and leave it to the jury to determine what is unjust, or unreasonable, wrongful, or criminal.

Neither is justification for the indefiniteness and uncertainty which in here in the statute under discussion to be found in any alleged necessity to mitigate a present and crying evil which all right-thinking men must deprecate and abhor; for it would seem that it might simply have been declared that a sale of any necessary for a stated percentage increase in price, beyond cost and carriage, should be a punishable crime. At least, such a law would not be objectionable on the ground here urged. That it would have been arbitrary may be conceded. But the statute here is just as arbitrary, and to its arbitrariness is added an indefiniteness, vagueness, and uncertainty, which is dangerous, beyond excusing, to the property and liberty of innocent men.

These views of Judge Faris are concurred in by District and Circuit Judges.

Detroit Creamery v. Kinmore, 264 Fed. 845;
Lamborn v. McAvoy, 265 Fed. 914;
U. S. v. Armstrong, 265 Fed. 683.
L. & N. R. R. v. Commissioners, 19 Fed. 679, 691.

This last case is a peculiarly instructive one. It was a bill for injunction based upon penalties imposed upon unjust and unreasonable compensation exacted by the carrier for carriage of freight. After an exhaustive review of a Statute which speaks of "unjust and unreasonable compensation," of "unjust and unreasonable discriminations" and of a "fair and just return" without providing a standard by which any such quality could be determined, the Judges declared the Statute to be invalid: "**No citizen under the pro-**

tection of this Court can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, and—and by force of such indefinite legislation."

The foregoing Brief and Argument have been prepared before the receipt of the Brief for the government. It is enough to say, that a perusal of that Brief, however has not led the counsel for the defendant in error to change their views of the invalidity of the Amendment of October 22, 1919.

In fact, the proposition involved here is so nearly self evident, that counsel are almost impelled to apologize for their own argument.

Finally, however, what does the situation upon this record present and indicate?

The jurisdiction of this Court depends upon the amendment of October, 1919. Its validity or invalidity is the sole question to be considered. The insufficiency of the indictment is not to be considered as the basis of the present writ of error. But why would not a test of the indictment involve a test of the Statute? The sale in which the government had and could have no concern, was at an "unjust" and "unreasonable" price. So says the indictment and that is all it does say. Shades of **United States against Cook**, of **United States against Cruikshank**, of **United States v. Carl**, where is the faintest descent to particulars in this indictment so as to advise the accused of the nature and cause of the accusation, or enable the accused to properly prepare for trial, or enable him to plead in bar to another indictment, for the same offense, the acquittal or conviction upon this indictment? And,

farthermore, where in the indictment formulated merely in the language of the Statute are facts stated, so that the trial court can determine upon those facts whether an offense has been committed? If juries are not to be left to arrive at the necessary conclusion of fact through guess work alone, what is to be said of the degree of guess work imposed upon the trial court, when it is left to arrive upon a correct determination of the sufficiency of the indictment upon the basis of facts not pleaded, and not pleaded because they do not exist? There are more things in Heaven and Earth than are dreamt of in the philosophy of this attempted regulation of private sales, made intrastate, in which the government, or the people of the United States can have no interest by reason of any governmental emergency, or necessity, proximately impending or not dependent upon mere fiction or conjecture.

It is respectfully submitted, that the judgment should be affirmed.

Chester H. Krum.

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For Defendant In Error.